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**BEFORE THE PUBLIC UTILITIES COMMISSION**

**OF THE STATE OF CALIFORNIA**

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| Order Instituting Rulemaking Regarding Whether to Adopt, Amend, or Repeal Regulations Governing the Award of Intervenor Compensation. | Rulemaking 14-08-020 (Filed August 28, 2014) |

# COMMENTS ON DECISION ADOPTING NEW RULE 17.5

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Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the Ratepayers of Lake Alpine Water Company ("RLAWC") hereby submit comments on the Proposed Decision Adopting New Rule 17.5. RLAWC supports the proposed rule, but hereby respectfully identifies legal errors that must be corrected to ensure that the legislature's intent for broad participating in Commission proceedings through the award of intervenor compensation is fulfilled.

## I. BACKGROUND

On March 13, 2015 Commissioner Florio issued a ruling in R.14-08-020 proposing the addition of a Rule 17.5 to the Commission's Rules of Practice and Procedure that would require any applicant for a CPCN to post a bond sufficient to pay an intervenor compensation award.[1] On June 14, 2016, the Commission issued the Proposed Decision of Commissioner Florio adopting new Rule 17.5.[2] The new Rule 17.5 arises from, and codifies, the Commission's existing authority and practice since 2011 requiring non-utility applicants to pay intervenor compensation claims.[3] In D.11-07-036, the Commission required the Nevada Hydro Corporation, a non-utility applicant, to post a bond to cover the costs of intervenor compensation for eligible protesting parties. Ultimately, the Nevada Hydro application was dismissed, but the Commission awarded intervenor compensation, and directed Nevada Hydro to pay the claims.

Similarly, in D.13-11-018, the Commission required Sacramento Natural Gas Storage ("SNGS"), a non-utility applicant for a CPCN to operate a natural gas storage facility in California, to pay Avondale Glen Elder Neighborhood Association more than $1.4 million for making a substantial contribution in the proceeding.

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[1] Assigned Commissioner's Ruling Proposing Changes to the Commission's Rules of Practice and Procedure and Seeking Additional Public Comment, March 13, 2015.

[2] Proposed Decision of Commissioner Florio Adopting New Rule 17.5, June 14, 2016 ("Proposed Decision").

[3] Proposed Decision, at p. 1.

## II. ANALYSIS

The stated purpose of proposed Rule 17.5 is "to ensure that all intervenors who make substantial contributions to ratemaking proceedings are compensated in accordance with the value of their contributions and to eliminate inconsistent outcomes in essentially similar proceedings."[4] Rule 17.5 as initially proposed would require "every applicant for a Certificate of Public Convenience and Necessity" to post a bond to guarantee payment of intervenor compensation claims. Thus the Rule appeared to apply only in situations in which an applicant is applying for a new CPCN. RLAWC filed comments proposing that the rule be clarified to include instances in which a non-utility applicant seeks authority to obtain an existing CPCN through a purchase or other exercise of control over an existing utility or its assets (*e.g.* via Advice Letter or an application filed pursuant to Cal. Pub. Util. Code Section 851 or 854).

The Proposed Decision adopts RLAWC's proposed clarification and revised the wording of Rule 17.5 to make clear the bond requirement applies to both new CPCN applicants and those seeking to acquire an existing CPCN.[4] The Proposed Decision, however, commits legal error by concluding that the Commission "may not require an entity that is not a public utility and does not seek to become a public utility to pay intervenor compensation."[5]

### A. There Is No Legal Distinction Between Applying For A New CPCN and Applying For Transfer of Existing CPCN

As discussed above, the Commission has twice required a non-utility to pay intervenor compensation.[6] Both of those cases involved a non-utility applying for a CPCN, and the Proposed Decision erroneously draws a distinction between applicants applying for a new

[4] Proposed Decision, at p. 6.
[5] *Id.*, at p. 7.
[6] D. 11-07-036 (*Nevada Hydro*); D.13-11-018 (*Sacramento Natural Gas Storage*).

CPCN from applicants acquiring a controlling interest in an existing CPCN.[7] The Proposed Decision notes that Section 1807, setting forth rules for payment of intervenor compensation, states that intervenor compensation should be paid by the "utility that is the subject of the transaction."[8] Yet a non-utility applicant is not converted to a utility unless and until the CPCN is granted. Nonetheless, the Commission has required these non-utilities to pay intervenor compensation. The same should be true for non-utility applicants applying to acquire an existing utility.

Although the Proposed Decision does not provide an explanation of the legal basis upon which the Commission may require non-utility applicants for a CPCN to pay intervenor compensation, the prior Commission decisions indicate that the applicant invoked the Commission's processes and thereby caused costs for interested parties that wish to participate in the proceeding. Denying intervenor compensation in instances where the CPCN was not granted would deny intervenors any way to be compensated. Such outcome is contrary to the legislative mandate to encourage widespread participation in Commission proceedings by making intervenor compensation available liberally. An application for transfer of control pursuant to Section 854 raises exactly the same issues as a CPCN applicant – the non-utility party invokes the Commission's processes and causes costs for interested parties that wish to intervene to challenge or support the application.

Despite the identical use of Commission processes and effect on intervenors wishing to participate, the Proposed Decision erroneously holds that the bonding requirement and payment of intervenor compensation should be paid by the CPCN applicant but not by the applicant for approval to acquire a controlling interest in an existing CPCN. The Proposed

[7] Proposed Decision, at p. 7.
[8] Proposed Decision, at p. 7.

Decision apparently views the existing utility as the "subject" of the proceeding in an acquisition and therefore liable to pay intervenor compensation. Such holding is legal and factual error. The utility being acquired is not the subject of the proceeding. Rather, the applicant's fitness to acquire an existing utility and ensuring the public interest will be served by the acquisition is the subject of the proceeding.

Further, Section 854 imposes the obligation to obtain approval for acquisition of an existing utility on the acquirer, not the utility. Section 854(a) mandates that, "[n]o person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission." For almost 100 years, California law has required any entity that wishes to acquire or otherwise control a public utility to obtain prior Commission approval "to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition to the transfer, as the public interest may require."[9] Commission precedent is split[10] as to whether the acquiring entity must demonstrate that the transaction will cause no negative effects for ratepayers (ratepayer indifference standard) or whether the acquiring entity must demonstrate that the transaction will create a benefit for ratepayers (net benefit standard).[11]

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[9] D.10-03-008, *Application of NobelTel, LLC (U6739C) and Nobel Holding, Inc. for Approval of an Indirect Transfer of Control of NobelTel, LLC* at p.4 (March 11, 2010) (*citing* D.09-08-017 at 7 and D.05-12-007 at 6). *See also San Jose Water Co.* (1916) 10 CRC 56; *see also, In re E. B. Hicks Water Company* (1990) 37 CPUC2d 13).

[10] D.11-12-007, *Western Water*, at p.2-3, §3.1. (*Compare D.00-05-047, 2000 Cal.PUC LEXIS 314,* concerning California Water Services Company's purchase of Dominguez Water Company, et al. (CWS/Dominguez) *with D.01-09-057, 2001 Cal. PUC* 2011 Cal. PUC LEXIS 540, **LEXIS 826,* concerning California American Water Company's acquisition of the water utility operations of Citizens Utilities (CalAm/Citizens).)

[11] *D.00-05-047, 2000 Cal. PUC LEXIS 314* **60-61. See also D.03-08-058, 2003 Cal PUC LEXIS 1134, at *9 (Sept. 21, 2003) citing orders following ratepayer indifference and net benefit approaches.

### B. The Proposed Decision Errs Legally By Concluding The Commission Lacks Jurisdiction To Require Non-utilities To Pay Intervenor Compensation

The Proposed Decision states, without explanation or citation to authority, that if an acquiring entity is a non-utility, "the acquiring entity cannot be made to post a bond."[12] The Proposed Decision provides, as an example, a non-utility holding company headquartered in another state that seeks to acquire a California utility.[13] This conclusion is contrary to the Commission's *Hydro Nevada* decision which required an out of state non-utility to pay intervenor compensation. It is further contrary to 30 years of consistent precedent in which the Commission has asserted jurisdiction over non-utility holding companies. Any non-utility applying to acquire an existing CPCN or utility, would stand the position of holding company of a utility and is therefore clearly subject to the Commission's jurisdiction.

The Commission has exercised its jurisdiction over non-utility holding companies to impose financial obligations on them. For example, in D. 95-12-018, the Commission required a newly formed holding company for SDG&E's utility operations to pay for a detailed verification audit by an outside auditor as a condition of approval for formation of the holding company. [14] The audit was to verify SDG&E's compliance with its affiliate transactions policies and guidelines, this Decision, and other applicable Commission orders and regulations.[15] Further the Commission required the holding company to pay a 25% transfer fee for any employee of SDG&E's utility operations who was transferred to the holding company parent.[16]

Thus, the Commission imposed on the non-utility holding company a required to pay for

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[12] Proposed Decision, at p.7.
[13] *Id.*
[14] D.95-12-018, *In the Matter of the Application of San Diego Gas & Electric Company (U 902-M) for Authorization to Implement a Plan of Reorganization Which Will Result in a Holding Company Structure,* at Ordering Paragraph 4 (Dec. 6, 1995).
[15] *Id.*
[16] *Id.*, at Ordering Paragraph 8.

costs it cause (verifying that SDG&E's utility operations continued to be in compliance with Commission regulations and orders after the creation of the holding company structure.)

Similarly, in PG&E v. the Public Utilities Commission, the court held that the Commission has authority to impose and enforce conditions imposed on approval of a utility's creation of a holding company.[17] The Court noted that the Commission jurisdiction was not based on the fact that the holding company would have a controlling interest in the public utility, but rather "its statutory power to impose conditions upon approving changes in control of, or issuances of securities by, public utilities." [18] The PG&E Court expressly noted that the Commission was not attempting to assert jurisdiction over the PG&E holding company by classifying it as a public utility.[19] Rather, the Commission jurisdiction was cognate and germane to its regulation of a public utility, namely, the utility subsidiary of the holding company.[20]

Similarly, the Commission has jurisdiction over any entity seeking to acquire a controlling interest in an existing utility and therefore, to act as a holding company for that utility. Requiring that non-utility company to post a bond to pay intervenor compensation is well within the bounds of the Commission's jurisdiction over holding companies. As discussed above, the Proposed Decision's conclusion that it may not require holding companies to post a bond to pay intervenor compensation appears to rely on the use of the term "utility" in Section 1807.

It is noteworthy, however, that the definition of the word "utility" has been interpreted to include entities other than utilities in the context of other statutory sections. In PG&E Corp., the

[17] *PG&E Corp. v. Public Utilities Com.,* at p.1200-1201 (2004).
[18] *Id.*, at 1204.
[19] *Id.*, at 1200.
[20] *Id.*, at 1201.

Court held that despite the legislative mandate in Cal. Pub. Util. Code Section 701 authorizing the Commission to "supervise and regulate every public utility," Section 701 does not limit the Commission's authority only to utilities. The Court held, "[a]lthough the statute initially refers to the PUC's power to the PUC's authority to do all things "necessary and convenient" in the exercise of that power is not expressly limited to actions against public utilities."[21]

The Proposed Decision's legal error in concluding that the Commission lacks jurisdiction to require non-utilities seeking approval to purchase a controlling interest in an existing utility appears to stem from the Proposed Decision's reliance on comments filed by a law firm, Goodin MacBride, on its own behalf. While the Proposed Decision provides only a short synopsis of the comments, much of the analysis in the Goodin MacBride comments asserting that the Commission lacks jurisdiction over non-utility applicants is legally incorrect and may have confused or mislead the Commission into rendering a legally faulty conclusion. RLAWC, therefore, will provide a detailed explanation of the error in the Goodin MacBride comments.

Goodin MacBride asserts that the California Legislature "foreclosed the Commission from making any awards of compensation lying outside the four corners of Sections 1801-1807." [22] Goodin MacBride's comments ignore a long line of intervenor compensation decisions subsequent to the 1985 case in which the Commission has used its authority to "fill in the gaps" to carry out the legislative mandate to award intervenor compensation in a manner that encourages robust public participation. The Nevada Hydro and Sacramento Natural Gas Storage decisions are two such recent examples. Goodin MacBride attempts to distinguish these decisions by claiming "it is doubtful that either decision would have survived court review had

[21] *Id.*, at p. 1198.
[22] Goodin MacBride comments, at p. 4 (citing *Southern California Gas Company, Pacific Telephone & Telegraph Co. and PG&E v. Public Utilities Commission.*, 38 Cal. 3d 64, 68 (1985).

either applicant sought the same; neither applicant, however, even sought rehearing."[23] Of course, speculation about what the courts would or would not have done in the face of a legal challenge that never occurred is entitled to no weight. If Goodin MacBride had deep concerns that the Commission had erred in requiring a non-utility to pay intervenor compensation, it could have moved for party status and challenged the decisions itself, as it has done in this proceeding.

In any event, Goodin MacBride's primary argument is that regardless of whether a non-utility may be required to pay intervenor compensation if it applies for a CPCN, non-utilities applying for approval to acquire an existing CPCN or utility may not be required to pay intervenor compensation.[24] Goodin MacBride cites to no authority for its argument; rather it states "we are aware of no instance in which the Commission has directed such non-public utility to pay intervenor compensation."[25] Simply because the Commission has not previously exercised such authority does not mean foreclose the Commission from doing so now. Indeed, if one were to believe that a lack of action by the Commission forecloses its ability to act at a later time, the Commission would never be able to issue decisions on cases of first impression.

Goodin MacBride's final argument against requiring non-utility applicants to pay intervenor compensation is its interpretation of a recent court decision regarding intervenor compensation arising from the failed AT&T/T-Mobile merger. Because AT&T withdrew its merger request prior to a "final" decision on the merits, AT&T contended that it should not be required to pay intervenor compensation. The Court held that the Commission was within its jurisdiction to require AT&T to pay intervenor compensation:

> The Legislature not only agreed with the CPUC's view that intervener

[23] *Id.*, at p. 4.
[24] *Id.*
[25] *Id.*

> compensation may be awarded on a discretionary basis in cases that resolve short of a decision on the merits, but more than that, delegated to the CPUC the authority to "fill in gaps" in Article 5 in the course of administering it based on express policy guidance in the statute. In **[817]** enacting Article 5 in 1984, the Legislature confirmed the CPUC's power to address intervener compensation on its own, and then, in 1992, gave the CPUC explicit policy criteria in section 1801.3, subdivision (b) to guide Article 5's administration. In light of this history, we conclude that the Legislature has expressly conferred power on the CPUC to "'fill up the details'" of the statutory scheme.[26]

The Court continued, "we find abundant evidence in the history and prehistory of Article 5 showing that this particular statutory scheme has been built, in effect, on a shared enterprise between the Legislature and the CPUC, with the CPUC having delegated authority undersection 1801.3, subdivision (b), to flesh out lacunae in the statutory language, incrementally, when called upon to do so in the course of implementing the overall statutory scheme."[27] The Court, however, was dissatisfied with the reasoning the Commission used in its order, and on that basis vacated the intervenor compensation award without prejudice so that the Commission could re-determine the awards based on reasoning set forth in the Court's order.[28]

Goodin MacBride, however, read the Court's order to completely eviscerate any discretion on the part of the Commission to determine what entities should be required to pay intervenor compensation. The comments assert, "Section 1807 permits the Commission to determine which public utility is "the subject of the hearing" but no more.[29] The statute does not delegate to the Commission the authority to determine by rule which entities are public

[26] *Id.*, at p.816-817 (*citing Ramirez, supra*, 20 Cal.4th at p. 799.)
[27] *Id.*, at p.821.
[28] *Id.*
[29] *Id.*, at p. 6.

utilities and which are not.[30]

Goodin MacBride's analysis is contrary to the precedent cited above in which the term "utility" has been interpreted to apply to non-utility holding companies and the Commission's prior decisions requiring non-utilities that invoke the Commission's processes for their own benefit, and thereby cause costs for interested intervenors, to pay intervenor compensation. The Proposed Decision's apparent reliance on the erroneous legal analysis in Goodin MacBride's comments has caused legal error in the Proposed Decision that must be reversed.

## III. CONCLUSION

RLAWC has demonstrated above that the Proposed Decision's conclusion that the Commission may not require non-utility holding companies to post a bond to pay intervenor compensation is contrary to Commission and California court precedent, and therefore constitutes legal error. RLAWC respectfully requests that Proposed Rule 17.5 set forth in the Proposed Decision be modified as follows (additions in bold font):

> (a) Except as set out in sub-paragraph (b) below, every applicant ~~for~~ seeking a Certificate of Public Convenience and Necessity (CPCN) through an initial application or a transfer of an existing CPCN **or acquisition of a controlling interest in an existing utility shall agree, as a condition of filing the application, that it will** post a bond or equivalent security instrument in a form and amount determined by the presiding Administrative Law Judge to be sufficient to guarantee payment of intervenor compensation awarded to any intervenors who make substantial contributions to the proceeding.

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Respectfully submitted,

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[30] *Id.*